THE POLICE POWER AND THE PUBLIC TASTE. — The obligation on the owner of property that his use of it shall not be injurious to the community, is no greater than the public welfare demands. The scope of the legislative power depends, then, on how we define that public welfare which the state is interested in preserving. This, however, is a matter depending so much on custom, the habits of the people, and the varying needs of the community, as applied to a multitude of details, that no clear rule can be laid down; and courts have preferred to leave the term undefined, except by the gradual process of judicial inclusion and exclusion, as the decisions of particular cases required. These decisions up to the present time in America are usually said to have protected only morals and the purely physical or material welfare of the community. Whether or not a similar protection should be extended to what might be called the æsthetic welfare of the community is suggested by a recent case. A statute gave park commissioners power to prohibit the exhibition of advertisements upon lands fronting on the public parks of the city of New York. The court declared by way of *dictum* that this statute was not a valid exercise of the police power. *People* v. *Green*, 85 N. Y. App. Div. 400.

What shall be the scope of the legislative or police power seems to be chiefly a question of what is reasonable. It is true that there are certain objects of legislation which are so highly desirable that any enactment which may fairly be said to further those ends is therefore reasonable and within the police power. Thus restrictions to preserve the public health or morals are always good.[1] But these do not exhaust the objects of proper legislative restriction. Mere public comfort is enough,[2] or convenience in distributing public burdens;[3] nor are cases wanting where the mere greater benefit to the public as compared with the smaller private harm has made the law reasonable and therefore good, although the object aimed at was not one of the well-recognized and defined objects of proper legislation.[4] Nor is it necessary that the exercise of power be such as has always been exercised. That to which we have been accustomed usually seems to us more reasonable, and the circumstance has great weight with the courts, but it is not necessary.[5] Indeed what is reasonable obviously varies with different periods and places, and measures to which one generation is indifferent may become, as civilization advances, a public good to another. Whether or not the New York opinion is right depends, therefore, upon contemporary common-sense. Is the "fitness" of the regulation "so obvious that all well-regulated minds will regard it as reasonable"?[6]

Some regulation for the protection of the public's æsthetic sensibilities will probably be allowed. Certainly there is a Massachusetts *dictum* to that effect,[7] asserting that the height of buildings might be regulated to preserve the beauty of a city square. It would certainly seem that patent-medicine advertisements exhibiting horrid sores or other loathsome diseases might be prohibited, although the public morals or health would not be involved. Whether merely hideous signs could be prohibited in certain special localities is a more doubtful question. As our American cities and their popu-

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1 Powell *v.* Pennsylvania, 127 U. S. 678.
2 State *v.* White, 64 N. H. 48.
3 Paxon *v.* Sweet, 13 N. J. Law 196; Carthage *v.* Frederick, 122 N. Y. 268.
4 Commonwealth *v.* Alger, 7 Cush. (Mass.) 53.
5 Knoxville Iron Co. *v.* Harbison, 103 Tenn. 421, *affirmed* 183 U. S. 13.
6 SHAW, C. J., in Commonwealth *v.* Alger, *supra*.
7 Attorney General *v.* Williams, 174 Mass. 476, 478.

lations advance in education and culture, many regulations, certainly, will become possible that a few years before would have been preposterous. It would be interesting to know how the New York court would have decided this question if it had been squarely before it.

SUBROGATION IN BEHALF OF A SURETY'S SURETY. — The right of a surety, when compelled to pay the debt, to be subrogated as against the principal debtor to the position of the creditor is, as a general proposition, unquestioned. While this right is often co-ordinate in its usefulness with the surety's other remedies of indemnity and exoneration, still its use frequently has obvious advantages. This is true when the principal is insolvent and the creditor holds securities,[1] or has a claim of especial dignity against the principal.[2] Like the surety's remedies of indemnity and exoneration, subrogation is equitable in its nature, and is accorded the surety to secure reimbursement.[3] It finds its justification in the fact that, as between principal and surety, the former is the only real obligor. The surety, while bound to the creditor, is not intended to bear the burden of the obligation. When, therefore, at the whim of the creditor, he is forced to liquidate his legal obligation, equity will prevent his suffering, and will throw the burden where it belongs.

The extent of this remedy of subrogation has been subject to some misapprehension in its application to a surety's surety. Thus in an early New York case,[4] it was held that a plaintiff who had become a surety to another, at the latter's instance, could not, on account of a defense in favor of the principal against the latter, claim subrogation against the principal. The court apparently proceeded on the ground that, as the plaintiff had become a surety at the request of the first surety only, and not at the request of the principal, he could stand in the position only of the first surety. The argument, however, fails to comprehend the situation. The primary feature to be noticed is that the principal, the first surety, and the surety to the surety are equally bound as obligors to the creditor. He can throw the burden of the obligation, in the first instance, on any one of them. The next and the important feature is that, in their relation to the principal debtor, the first surety and the surety to the surety stand as co-sureties. This is clear from the fact that the second surety became equally liable with the first surety. This legal obligation he was willing to assume because of the private agreement of suretyship between himself and the first surety. That the plaintiff did not become a surety at the request of the principal is unimportant. A party who becomes a surety even in the face of an express refusal by the principal to receive him as such, is nevertheless entitled to subrogation.[5] The equity of subrogation is not the result of contract, but of the burden of being compelled to pay another's debt. Upon analysis, therefore, since the plaintiff is a surety to the principal debtor, it follows that he is entitled to the ordinary surety's right of subrogation.

This right is recognized in the Virginia case of Leake *v.* Ferguson,[6] and

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[1] Goddard *v.* Whyte, 2 Gif. 449.
[2] Lidderdale *v.* Robinson, 12 Wheat. (U. S.) 594.
[3] Succession of Dinkgrave, 31 La. An. 703.
[4] New York State Bank *v.* Fletcher, 5 Wend. (N. Y.) 85.
[5] Mathews *v.* Aiken, 1 N. Y. 595.
[6] 2 Gratt. (Va.) 419.